IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 505

LESTER A. CRANCER and GEORGE B. FLEISCHMAN, Co-Partners Doing Business Under the Firm Names of VALLEY STEEL PRODUCTS COMPANY and MID-VALLEY STEEL COMPANY, respectively, *Petitioners and Appellants Below,*

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Chicago, Rock Island and Pacific Railway Company, a Corporation, *Respondents and Appellees Below.*

PETITIONERS' REPLY BRIEF

Ira B. Rosenblum,
Bernard Mellitz,
Clyde W. Wagner,
320 North Fourth Street,
St. Louis, Missouri,

Abraham B. Frey,
Federal Commerce Trust Bldg.,
St. Louis, Missouri,
Attorneys for Petitioners.

BURTON & SKINNER, PRINTERS, ST. LOUIS

INDEX.

AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 505

LESTER A. CRANCER and GEORGE B. FLEISCHMAN, Co-Partners Doing Business Under the Firm Names of VALLEY STEEL PRODUCTS COMPANY and MID-VALLEY STEEL COMPANY, Respectively, *Petitioners and Appellants Below,*

vs.

FRANK O. LOWDEN, JAMES E. GORMAN and JOSEPH B. FLEMING, Trustees of the Chicago, Rock Island and Pacific Railway Company, a Corporation, *Respondents and Appellees Below.*

PETITIONERS' REPLY BRIEF

Petitioners deem it essential to reply to respondents' brief in concise and orderly fashion primarily for the reason that respondents' brief has opened for consideration all of the issues which were involved in the trial of the instant cause in the District Court as well as those issues which were raised by petitioners' application for writ of certiorari.

We welcome the opportunity to meet all the issues thus raised, squarely, and we believe thereby that we shall be enabled to convince this Court that the decision of the District Court should be reversed outright. We take this position confidently even in the face of the adjectival barrage which counsel has thrown against petitioners' application for writ of certiorari and brief in support thereof.

Petitioners' statement is termed by counsel "inaccurate", "incomplete", "obscure" and "rambling"; all of this without a bill of particulars from respondents as to the manner in which the statement is "inaccurate", "incomplete", "rambling" or "obscure", and despite the fact that this Honorable Court granted the writ of certiorari.

Petitioners resent this method of presentation, which smacks of propaganda rather than argument. We do not think that the propaganda will prove successful.

We proceed now with an analysis of respondents' brief, point by point.

I.

The first point made by respondents is that the District Court's judgment in favor of respondents and against petitioners was supported by evidence there adduced. We emphatically deny this contention of respondents and we have consistently denied it in the District Court and in the United States Court of Appeals.

The respondents' petition in the District Court sought to recover additional freight charges on certain shipments of pipe thread protectors. Petitioners had previously paid to the railroad the so-called "scrap iron rate" on the shipments involved. The railroad alleged it was entitled to recover from petitioners the same rate on discarded thread protectors as was charged by the railroads for shipments of new thread protectors. There could be no question but

what it was the duty of the railroad to show, and the burden of proof was upon it to show, that it was entitled to these additional freight charges. In other words, the burden of proof was upon the railroad to show that the articles shipped came within some other definite classification than that of "scrap iron".

The definition of scrap iron or steel in the tariff is as follows:

> "Pieces of iron or steel having value for remelting purposes." (R. 158-59.)

Both parties to the suit agreed that this "value" was a commercial value, (R. 47-164) and it thus became necessary for the railroad, in order to win the case, to show by relevant evidence that the articles in question had a greater commercial value in dollars and cents than "scrap iron" had.

If a careful review is made of the testimony of the respondents' witnesses in respect to the material in the cars, certain striking and uniform facts will be observed. The only witnesses for the respondents who saw the material shipped in the cars in question were inspectors who worked for the Western Weighing and Inspection Bureau. This was an agency of the railroads set up for the express purpose of checking into rates under which various commodities moved as freight. Of course, their aim would be most likely to fix such rate as would give the railroads more money if that were in any manner possible.

The thread protectors in the various cars were piled helter skelter in open coal cars, (R. 75) and these inspectors did nothing by way of inspection but walk over the tops of the cars, (R. 82, 83, 123, 142), and then changed the classification of the material, based upon such cursory inspection.

Uniformly, they had no expert knowledge whatsoever as to the thread protectors contained in the cars. They

did not know if the thread protectors were made of iron or steel. (R. 157-160) They did not know the difference between iron and steel.

Inspector McGrane, for example, said that he made the change from the scrap iron rate to the other rate, which appeared as "rings, thread protecting, iron, in packages" because he came to the conclusion that the articles in the car had some other value than for remelting purposes (R. 70) and when asked as to whether or not he knew anything at all about the value of the articles, his answer was an unequivocal "No."

When petitioners sought to have this testimony of McGrane stricken from the record, the Court refused and permitted it to stand, (R. 70-71), and this was clearly erroneous. Witness McGrane also showed his utter lack of any knowledge about the applicable freight rates when he stated that even if the protectors were consigned to a mill for remelting purposes and had value only for remelting purposes, he still would apply the rate applicable to new protectors. (R. 77) He took the wholly unwarranted position that even if the threads were completely rusted off a thread protector, and even if it was pitted and had holes in it, he would classify the cars questioned as containing thread protectors which should take the rate applicable to new thread protectors. (R. 79)

Again, with a similar lack of any knowledge whatsoever about the thread protectors, their composition or nature, Inspector Timmons, over the objection of the petitioners, testified that from his observation, the thread protectors were usable in the condition in which they were found in the cars which he inspected. (R. 91.) Timmons likewise did not know the value of the thread protectors as expressed in terms of money (R. 106), and he did not even bother to look at the classification book, but changed the classification from scrap iron to thread protecting rings arbitrarily. (R. 107-108.)

Inspector Usher likewise made an arbitrary change in the rate to be applied to the shipments in the car which he inspected, but he made the significant admission that if a carload of protectors such as he saw were going to a mill for remelting, such car would get the scrap iron rate. This inspector stands convicted out of his own mouth, that he was seeking to gain for the railroad additional freight charges on a basis which the Interstate Commerce Act itself forbids, to-wit, the use basis.

Inspector Stohlman, again, made a casual inspection by walking on top of an open car that was loaded as much as five feet deep (R. 142) with thread protectors. He stated that the basis of his inspection was that since none of the thread protectors were broken or badly bent, he would not call them scrap (R. 141). He had no more expert or other knowledge about the thread protectors, or their nature or quality, or whether or not they were fit to be remanufactured, or what the remanufacturing process was, than any of the other so-called inspectors.

In connection with the question as to the commercial value of the articles shipped in the cars in controversy, there was only one witness who was asked the specific question of whether or not the material had a commercial value for remelting purposes. One of the petitioners, George Fleischman, was asked this question and was permitted by the court to answer it as follows, to-wit:

> "Q. I will ask you to state whether or not the material shipped in these seven cars had any commercial value, other than for remelting purposes * * * at the time it was shipped?"
>
> "A. The material shipped in these cars had no commercial value other than for remelting purposes." (R. 215.)

At only one place in respondents' record was there any effort to introduce testimony by the respondent concern-

ing this vital issue, and it is petitioners' contention that this testimony was either of no probative value or wholly inadmissible. Respondent's witness, Perry, was the traffic manager for the Pittsburg Screw & Bolt Corporation, the manufacturer of the new thread protectors which are the subject of this controversy. (R. 161.)

Perry was asked the following question by respondents:

"Q. During that period between June and August, 1937, what was the prevailing market price of thread protectors sold for reconditioning purposes?" (R. 165.)

His answer was: "$20.00 to $50.00 a ton."

This testimony had no probative value in that there was not a scintilla of evidence in the record that there was any market price for thread protectors sold for reconditioning purposes. All of the testimony in the record was that the thread protectors were purchased from scrap iron yards or oil companies which had accumulated them as scrap (R. 215, 216, 217, 218), and they were not sold for any specific purpose such as for reconditioning.

It might well be that thread protectors bought or sold for the specific purpose of reconditioning them might have had a greater commercial value than scrap iron or steel, and thus the market price which Mr. Perry testified to, might well have been higher than the market price of thread protectors shipped in the seven cars. This is wholly conjectural, however, and suffice it to reiterate at this point that Perry gave no testimony concerning the market value of the thread protectors such as were contained in the seven cars in question.

Perry's testimony as to the price of scrap iron was likewise of no value in this proceeding. He was asked if he had had any experience in scrap iron. (R. 174.) He replied that he had had over a period of "several years."

He stated further that it had been his business to keep track of the prevailing market value of scrap iron at different periods, and that this had come under his duties as general traffic manager.

Then the precise question was asked him:

> "Q. Have you refreshed your recollection, and can you tell the Court what was the prevailing market price of scrap iron for remelting purposes in 1937?" (R. 174.)

Counsel for petitioners objected to the question as not being the proper way to prove the market price, and further that the witness was not qualified to testify. On the objection being overruled, the witness testified: "$12.00 to $17.00 a gross ton." Counsel for petitioners then moved that the answer be stricken out for the reason that it was not limited as to time and locality.

It is obvious from the testimony we have quoted that it should never have been permitted in evidence. It is well known, and not a matter of any dispute, that the price of scrap iron varies from day to day, week to week, and month to month, and varies as well in various localities depending on the transportation cost and other circumstances.

The shipments in question, as set forth in respondents' petition (R. 4) moved during the months, June to August, 1937. Thus, Perry's testimony was valueless because it was not directed to this period, June to August, 1937, but to the whole year, and it was not directed to the value of scrap iron in the locality where the material was shipped or the locality where it was received.

In the case of U. S. v. Baxter, et al., 46 Fed. 350, the witness was asked as to his best recollections as to the value of certain logs, and it was pointed out in the opinion that the witness's evidence was not directed to the

particular place where the value was to be fixed, and the Court stated that the value might be one thing in one city and another value in another city, and criticized the question and the answer given to it because neither confined the value "at any particular place", and the Judge held that it was an error to permit the witness to answer such question. Appeal to the Supreme Court of the United States was dismissed in this matter without opinion of the Court, at Volume 12 U. S. 989.

Similarly, in Morrow v. Wabash Railway, 276 S. W. 1030, (Kansas Court of Appeals), testimony of the witness who had no experience in selling live stock in a given market, and whose opinion was not based on a reading of market reports published in trade journals, was criticized as incompetent, and it is obvious from the decision in this case, that the market value must be fixed at a given locality before testimony concerning it is admissible.

In Pabst Brewing Co. v. Horst Co., 229 Fed. 913, l. c., 919, the Court considered testimony as to market value and ruled that in order to be admissible, the market price must relate to the specific period in question or reasonable time before and after, and to the exact and particular locality of the delivery of the goods in question.

The rule is succinctly stated in 22 Corpus Juris, pages 189 and 190 in its treatise on the subject of Evidence as follows:

> "If property has a market value at the place involved in the inquiry, the evidence is properly directed to establishing it at that place. . . . When the issue of value of personal property is involved in an action, it is usually with respect to the value at some particular time, and hence evidence of value is relevant only when directed to value at the time in question or at a time so near thereto that it may reasonably be expected to throw some light on the value at such time."

Witness Perry did not tell the District Court in what locality the market price for scrap iron, in 1937, amounted to $12.00 to $17.00 per ton; nor did he tell the Court what the market price was at the relevant time from June to August, 1937, and therefore his testimony should not have been admitted.

There was no testimony concerning the market price of scrap iron anywhere in the record other than Perry's. It, therefore, ought to be conceded that the Court had no proper admissible evidence upon which a judgment might be based to the effect that the commercial value of scrap iron in the localities from which the cars were shipped or delivered, was less than the commercial value of discarded thread protectors.

Reviewing the case as a whole, the conclusion is inescapable that respondents did not show that the material shipped had any commercial value other than for remelting purposes, and therefore, respondents should not have prevailed in the District Court and this cause ought to be reversed outright.

With reference to the manifest error of the District Court in permitting the testimony to be adduced with reference to the use to which the material shipped was put, and the error in basing its decision in favor of respondents upon the use to which the material was put,—petitioners feel that they have covered this issue fully in their original brief. Respondents' attempts in this connection to assert that the cases of Interstate Commerce Commission v. Delaware, Lackawanna & Western R. R., 220 U. S. 235 and Interstate Commerce Commission v. Baltimore & Ohio R. R., 225 U. S. 326, are not applicable,—are wholly and completely illogical.

The conceded rule is that a railroad may not fix one rate for an article to one shipper and a different rate to

another shipper based on the use to which the individual shipper may put the article. How fantastic is it then to argue that while this is the rule, yet evidence is admissible on the matter of use, to show the character of the article; for, when a court permits introduction of evidence to show use for this purpose and when a court then bases its decision that a given article takes a higher freight rate because used in a different manner by a particular shipper, then the whole theory underlying the anti-discriminatory Section 2 of the Interstate Commerce Act is rendered a hollow joke.

In the case at bar, we find this situation: The decision of the District Court permits the article in question to be shipped to a scrap mill for remelting purposes at the scrap iron rate (R. 247-8) while the identical articles when shipped to petitioners for re-manufacturing would be charged the rate applicable to new pipe fittings which is three to four times higher than the scrap rate. Is this not a glaring example of discrimination which our Congress has definitely forbidden in the Interstate Commerce Act, Section 2? A reversal of this case will prevent such discrimination.

II.

The admission in evidence of the decision of the Interstate Commerce Commission in Crancer, et al. v. Abilene & Southern Ry. Co., et al., 223 I. C. C. 375 (R. 190-195) was clearly a reversible error and cannot be said to be harmless error. The decision was admitted on the theory that it was "evidence of what the correct tariff rate is" (R. 195) and it is obvious that the decision in that case, which did not relate in any way to the shipments in issue in the case at bar, was no evidence whatsoever of what the correct tariff rate was on the shipments in the case at bar. Especially is this true since the Court's finding and judgment were supported by no other competent evidence.

III.

Respondents in the third portion of their brief asserted that the District Court had the right to proceed with the trial of the case even though petitioners' complaint was pending before the Interstate Commerce Commission with respect to the reasonableness of the tariff rate sought to be collected in the suit at bar.

Respondents seek to confuse the issue by asserting that the complaint now pending before the Interstate Commerce Commission is the same as the previous complaint filed, which resulted in the decision of the Commission in the case of Crancer v. Abilene, 223 I. C. C. 375; but this is not a fact. The three-judge court decision of the District Court (Crancer, et al. vs. U. S., 23 Fed. Sup. 690), which dismissed petitioners' bill to enjoin the Crancer decision of the I. C. C., is then mentioned by respondents. Then, respondents state that this Honorable Court affirmed the decision of the three-judge court in Crancer v. U. S., 305 U. S. 567. However, respondents failed to state that the three-judge District Court in its opinion in 23 Fed. Sup. 690, refused to consider the order and decision of the Commission upon the first complaint (223 I. C. C. 375), for the reason that the order was held to be a negative order and therefore not reviewable. The three-judge District Court never passed upon the merits of the order of the I. C. C. upon the complaint (223 I. C. C. 375). And respondents also failed to point out that this Honorable Court in 305 U. S. 567 sustained the decision of the statutory three-judge court for the same reason that the order sought to be reviewed was a negative order and therefore not reviewable, and upon the authority of a line of decisions commencing with Hooker v. U. S., 225 U. S. 302, and ending with U. S. v. Griffin, 302 U. S. 226.

Respondents have also failed to state that the negative order theory is a relic of the past in light of the decisions

in the cases of Rochester Telephone Corp. v. U. S., 307 U. S., 125, 59 S. Ct. 754, and Mitchell v. U. S., 313 U. S. 80, 61 S. Ct. 873, in which it has been held (specifically in the latter case) that an order of the I. C. C. though negative in form is subject to review by the Courts of the U. S. in the statutory manner prescribed.

Thus, we have the situation of this first complaint filed before the Commission upon which an order of the Commission was made, but as to which petitioners never have had their "day in court" to determine whether or not the order of the Commission was proper.

Nevertheless, there is now pending before the Commission a complaint which is substantially different in form and substance from that of the first complaint upon which no review was ever had in the courts of the United States. That there is and was a substantial difference between the second complaint now pending and the first complaint, is clearly attested by the fact that the Commission upon hearing of the second complaint handed down a decision (243 I. C. C. 509) in which the rates in question in the case at bar were definitely and unequivocally found to be unreasonable, not only for the past but also for the future. All the railroads involved were ordered to post new rates conforming to the order of the Commission. Subsequently, the Commission re-opened the matter for further hearing and such further hearing has been held, but the decision in 243 I. C. C. 509, which petitioners filed with their writ of certiorari as "Appendix A" is the last expression of the Commission and we believe that it is proper to say that until the Commission issues a new order (if any is to be issued) the rates involved in the case at bar have been decided by the Commission itself to be unreasonable.

The foregoing statement of the status of the complaint now pending before the Commission should give fresh confirmation, if any is required, to the rule so aptly ex-

pressed in the cases cited by Petitioners in their original brief to the effect that where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission and this is true whether the function being exercised is either administrative or judicial.

The pending complaint before the Commission was filed prior to the suit in the case at bar and respondents were parties to that complaint. They had no right to proceed with the trial of their cause in the District Court when the very rates which they were seeking to collect were charged with being unreasonable. It is clearly the duty of the I. C. C. to determine this fact first. It is not the duty of the railroad to collect a tariff rate which is unreasonable. The tariff rate which respondents sought to collect in the instant suit has been held to be unreasonable by Div. 3 of the Interstate Commerce Commission (243 I. C. C. 509). That a further hearing has been granted by the Commission certainly does not give any assurance to the respondents that the Commission will not reaffirm its ruling that the rates were unreasonable, and therefore there should not have been the unseemly haste on the part of the respondents to prosecute its suit, pending the outcome of the decision of the complaint before the Commission.

There are other cases pending in the Eastern District of Missouri (at St. Louis, Mo.) of an exactly similar nature as that of respondents' and another district judge in St. Louis (R. 33) recognized that the trial of the causes before him should not be had pending the outcome of this complaint before the Commission. In fact, in the instant case at bar, District Judge Moore did postpone the trial of this case upon petitioner's request and upon the very grounds here urged for the postponement of the trial, but then the court changed its mind and this was not within

the sound discretion of the court in continuing or failing to continue an ordinary cause; for, it was the bounden duty of the court not to proceed with a case while the Commission had the matter of the reasonableness of the rates before it.

The decision cited by respondents in the Second Circuit, Penn. Ry. Co. v. Fox & London, 93 F. (2d) 669, is no authority for respondents' position, for in this last named case, there is no showing that the matter of the proper freight rate had ever been brought by complaint before the Commission prior to the bringing of the suit by the railroad carrier, or at any other time.

Respondents have sought to distinguish the authorities which we cited in our original brief, but in our opinion they have failed to do so, since the rules contained in the cases cited by us originally are fully and completely applicable to the situation in the case at bar.

We cannot understand why it was necessary for this respondent to prosecute their action with almost religious fervor when seven or eight railroads in identical causes have been willing to await the outcome of the proceedings before the Commission. The only situation which seems to furnish a clue to this puzzle is in the fact that one of the prominent witnesses, for railroad respondent was a man by the name of Perry. Perry was the traffic manager for the Pittsburg Screw and Bolt Co. (R. 161) which manufactured thread protectors involved here as new items.

The Pittsburg company was definitely interested in preventing competition by petitioners who reconditioned and re-manufactured the scrap thread protectors. Witness Perry appeared voluntarily, without subpoena and out of a sick bed (R. 184) and testified for the railroad that the rate on scrap thread protectors should be the same as on

new thread protectors in his opinion and in the opinion of his company.

Perry and his company have appeared in the proceedings before the I. C. C. as intervenors, and up to recently have consistently insisted that the rate on new thread protectors should likewise be applied on scrap thread protectors. We think it is the proper inference to draw from the record that the instant cause of action has been sought to be rushed at the insistence and with the support of the Piftsburg company in its effort to do away with the competition furnished by petitioners by means of their remanufacturing processes.

We adhere to the belief that our District Court should not thus proceed with an action, when its judgment is likely to result in giving to a railroad a verdict based upon a rate which has been or will be held by the I. C. C. to be an unreasonable rate, in a pending proceeding.

We respectfully pray this Court to reverse the judgment outright because it violates the letter and spirit of the I. C. C. Act and because of the lack of evidence to sustain a judgment on behalf of respondents; or in the alternative that it send this cause back with instructions to the District Court to await the outcome of the proceedings before the Commission.

Respectfully submitted,

IRL B. ROSENBLUM,
BERNARD MELLITZ,
CLYDE W. WAGNER,
320 North Fourth Street,
St. Louis, Missouri,

ABRAHAM B. FREY,
Federal Commerce Trust Bldg.,
St. Louis, Missouri,
Attorneys for Petitioners.